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No. 752

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

FRANCIS L. McDERMOTT, *Petitioner*,

v.

JOSEPH J. JAMELA, ET AL., AS REPRESENTATIVE OF THE ENTIRE MEMBERSHIP OF LOCAL 284 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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The petition for writ of certiorari filed by petitioner adequately refers to the opinion delivered in the court below; it also contains a satisfactory statement of the grounds on which the jurisdiction of this Court is involved. However, the petition does not contain a statement of the case which presents, as required by the Rules of this Court, all of the facts material to a consideration by this Court of its jurisdiction herein.

Rule 23(f) of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954 to the extent here pertinent, reads:

If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The petition fails in every respect to comply with any of these requirements of Rule 23(f) simply because no federal question, including the "question presented for review" as set forth in the instant petition, was raised in, or considered by, the courts below. Accordingly, this Court would not be *reviewing* the question presented by petitioner but, instead, would be initially deciding it without the Supreme Judicial Court of the Commonwealth of Massachusetts having had the opportunity to pass upon it.

The only questions upon which the Supreme Judicial Court of the Commonwealth of Massachusetts, the highest state court, ruled were set forth by petitioner's brief in that court, as follows:

1. Does article 23, sec. 3 . . . [of the Constitution of the International Brotherhood of Electrical Workers] require the suspension of a member for the non-payment of dues upon the member's becoming indebted for three months' dues.

2. Whether the I.B.E.W. and Local 284 are estopped from denying that the plaintiff had three full months for the payment of his dues for the month of March 1953, before being suspended under article 23, sec. 3 . . . , for non-payment of dues.

3. Whether the plaintiff was required to seek employment in fields outside of his trade in order to mitigate damages.

Not only was the "question presented" in the instant petition not raised in the highest court of the State, it was not raised at any stage of the proceedings in any State court below. Accordingly, since the record is utterly devoid of any reference to the federal question which petitioner is now requesting this Court to review, petitioner had no choice but to ignore the requirements of Rule 23 (f).

The plain fact is that the State courts were only requested to pass upon questions of local law concerning the construction and interpretation to be accorded the provisions of a constitution of an unincorporated association and the by-laws of a constituent member of such association. As the Supreme Judicial Court itself said, "The principal question for our decision is whether the plaintiff tendered his March, 1953, dues seasonably under the Constitution and by-laws" (Pet's Br. App. 1387).

ARGUMENT

Respondents assert that under the fundamental principles enunciated by this Court in its decisions concerning its jurisdiction to review the judgment of a state court, this Court is without jurisdiction to grant the review here sought by petitioner.

Petitioner seeks to invoke the review jurisdiction of this Court under 28 U.S.C. § 1257 (3) which provides, in pertinent part, that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by this Court by a writ of certiorari "where any title, right, privilege or immunity is *specially set up or claimed* under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States" (emphasis supplied). Jurisdiction under this section, however, cannot be invoked by peti-

tioner in view of the construction accorded the requirements of this section by this Court.

In order to give this Court jurisdiction, under 28 U.S.C. 1257(3), to review by a writ of certiorari, a decision of the highest court of a state against a title, right, privilege or immunity claimed under the Constitution of the United States, it must "appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way" *Spies* v. *Illinois*, 123 U.S. 131, 181. See, also, *Brown* v. *Mass.* 144 U.S. 573, 579; *Harding* v. *Illinois*, 196 U.S. 78, 85. In specifically construing the meaning of the words "specially set up or claimed", this Court stated in *Oxley Stave Company* v. *Butler*, 166 U.S. 648 at 654-5:

> . . . These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States . . . , he must so declare; and unless he does so declare 'specially', that is, unmistakably, this court is without authority to re-examine the final decision of the state court."

There is nothing in the record, respondents submit, that would indicate that petitioner "unmistakably" declared his intention to invoke the Constitution of the United States for the protection of his rights. Indeed, there is nothing in the record which would give rise even to a remote inference that the mind of the State court was directed to or considered the question now being presented to this Court. On the contrary, it is apparent from the record that such a contention was not raised in the State court.

In this connection, this Court has pointed out that there

"must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party. . . . A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. . . . A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it" *Dewey* v. *Des Moines*, 173 U.S. 193, 199-200. "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature" *Whitney* v. *California*, 274 U.S. 357, 362.

This Court has long regarded it as "well settled that this court, on error to a state court, can not consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered . . ." *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248. See, also, *Whitney v. California*, *supra*; *CIO* v. *McAdory*, 325 U.S. 472, 477; *Caperton* v. *Bowyer*, 14 Wall 216, 236; *Hulbert* v. *Chicago*, 202 U.S. 275, 280, 281; *Dorrance* v. *Pennsylvania*, 287 U.S. 660; *Chandler* v. *Manifold*, 290 U. S. 665; *Flournoy* v. *Wiener*, 321 U.S. 253; *Charleston Ass'n* v. *Alderson*, 324 U.S. 182, 185, and cases cited. And this "well settled" rule has been strictly applied by this Court. Thus, for example, it has been held that "a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon . . ." *Bowe* v. *Scott*, 233 U.S. 658, 663; a Federal question cannot be raised by a petition for certiorari where a failure to follow procedure designed by a State to raise such a question has resulted in a waiver (*Parker* v. *Illinois*, 333 U.S. 571); where a Federal constitutional issue was not raised in the trial court but was

raised for the first time in a petition for rehearing, the refusal, without opinion, of the highest court of the State to hear the case precludes review on certiorari by this Court (*Stembridge* v. *Georgia*, 343 U.S. 541, 547). See, also, *Hulbert* v. *Chicago*, 202 U.S. 275 holding that it is too late to raise a Federal question by a statement in a writ of error that constitutional rights and privileges were involved and decided by the highest court of the State against the plaintiff, even if the Chief Justice of that court allowed the writ, where, in fact, the claim that such rights and privileges were involved was never brought to the attention of the trial court or the highest court of the State. And, see, also, *Bailey* v. *Anderson*, 326 U.S. 203, 206-7 holding that if Federal questions were initially raised by assignment of errors in the highest state court and that court refuses to consider any issue not presented to the trial court, this Court is without jurisdiction.

On the basis of the foregoing, respondents submit that if this Court is without jurisdiction in cases in which there were abortive attempts to raise Federal questions in the State courts below, then, *a fortiori*, it is without jurisdiction in a case in which no such attempt whatsoever was made. It is obviously too late to raise the Federal question for the first time in the petition for certiorari filed with this Court since such petition is not part of the record of the State Court proceedings. See *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700; *Whitney* v. *California*, *supra*.

From the viewpoint of this Court's jurisdiction, there is no possible basis for distinguishing the instant case from those cited above in which this Court has declined jurisdiction. The fact that petitioner *now* asserts that his constitutional rights of "due process" and "equal protection of the laws" have been infringed does not render this case unique. See *Herndon* v. *Georgia*, 295 U.S. 441; *White River Lumber Co.* v. *Arkansas*, *supra*; *Bryant* v. *Zimmerman*, 278

U.S. 63. As this Court stated in *Bonner* v. *Gorman*, 213 U.S. 86 at 91-2:

> "It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States, *Central Land Company* v. *Laidley*, 159 U.S. 103, 112, and that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late. *Union Mutual Life Ins. Co.* v. *Kirchoff*, 169 U.S. 103, 110. And see *Sayward* v. *Denny*, 158 U.S. 180; *Mutual L. Ins. Co.* v. *McGrew*, 188 U.S. 291, 308. Moreover, 'according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed' *Arkansas Southern Railroad Company* v. *German National Bank*, 207 U.S. 270; *California Powder Works* v. *Davis*, 151 U.S. 389; *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 210 U.S. 281".

CONCLUSION

In this case, a decision upon a Federal question was neither necessary to the judgment of the State court nor in fact was made the ground of it. Indeed, no Federal question was timely raised or properly presented to the State court. Accordingly, it is well established by the prior decisions and long-continued practice of this Court that there is no occasion for the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts to be reviewed. We respectfully submit that the petition for certiorari should be denied.

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